

No. PD-0771-17

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
7/12/2019
DEANA WILLIAMSON, CLERK

JOHN CHAMBERS,

Appellant

v.

THE STATE OF TEXAS,

Appellee

* * * * *

**STATE OF TEXAS
MOTION FOR REHEARING**

* * * * *

Appeal from Cameron County

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TABLE OF CONTENTS

| | |
|---|----|
| INDEX OF AUTHORITIES..... | 3 |
| GROUND FOR REHEARING..... | 4 |
| 1. The Court erred when it determined that TCOLE did not have the right or duty to require the firearm proficiency records. The erroneous reliance on those findings impacts the Court’s analysis and holding. | |
| 2. A rehearing should be granted because the State has shown that the government has the legal authority to require the keeping of records by TCOLE, and therefore shows that it is legally possible to defraud the government by filing a false record. | |
| ARGUMENT..... | 5 |
| CONCLUSION..... | 19 |
| PRAYER FOR RELIEF..... | 20 |
| CERTIFICATE OF COMPLIANCE | 21 |
| CERTIFICATE OF SERVICE..... | 22 |

INDEX OF AUTHORITIES

CASES

| | |
|--|------|
| <i>Chambers v. State</i> , ---- SW3d ----, 2019 WL 2612770, *7 (Tex. Crim. App. June 26, 2019)..... | 5 |
| <i>Cleveland v. City of Elmendorf, Tex.</i> , 388 F.3d 522 (5th Circ. 2004)..... | 5, 6 |
| <i>Dixon v. McMullen</i> , 527 F.Supp. 711 (N.D. Texas, Ft. Worth Div. 1981)..... | 5 |

STATUTES

| | |
|---|-------------------------|
| Tex. Occupations Code, Chapter 1701 <i>et seq</i> | 5, 7, 8, 10, 13, 16, 17 |
| Tex. Occupations Code §1701.151..... | 5, 7, 8 |
| Tex. Occupations Code §1701.004..... | 5 |
| Tex. Occupations Code § 1701.355..... | 13 |
| Tex. Occupations Code § 1701.507..... | 15, 17 |
| Tex. Occupations Code § 1701.153..... | 16 |
| Tex. Occupations Code § 1701.303..... | 16, 17 |
| Tex. Occupations Code, §1701.001..... | 10 |
| Tex. Occupations Code, §1701.452..... | 10 |
| TAC § 211.1..... | 8, 10 |
| TAC § 217.7..... | 10, 11, 12, 13 |
| TAC § 211.19..... | 12, 13 |
| TAC § 211.1 (43)..... | 18 |
| Tex. Code Crim. Proc. Ann. § 2.12..... | 5, 6 |
| Tex. Crim. Proc. Code Ann. § 2.12 (3)..... | 5 |
| Tex. Penal Code § 37.10..... | 14 |

No. PD-0344-17

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

JOHN CHAMBERS,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Cameron County

* * * * *

STATE'S MOTION FOR REHEARING

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

GROUND FOR REHEARING

3. **The Court erred when it determined that TCOLE did not have the right or duty to require the firearm proficiency records. The erroneous reliance on those findings impacts the Court's analysis and holding.**
4. **A rehearing should be granted because the State has shown that the government has the legal authority to require the keeping of records by TCOLE and therefore shows that it is legally possible to defraud the government by filing a false record.**

ARGUMENT

1. **The Court erred when it determined that TCOLE did not have the right or duty to require the firearm proficiency records. The erroneous reliance on those findings impacts the Court's analysis and holding.**

The Texas Commission on Law Enforcement (herein, "TCOLE") regulates law enforcement licensees, including minimum educational, training physical, mental and moral standards for licensing as an officer. V.T.C.A. Occupations Code §1701.151; *see also Dixon v. McMullen*, 527 F.Supp. 711 (N.D. Texas, Ft. Worth Div. 1981); (Discussing the powers and duties of the State Commission on Law Enforcement Standards and Education, (the precursor agency of TCOLE), delegated to it by the State legislature. V.T.C.A. Occupations Code §1701.004.

"Peace officer" is defined in Article 2.12 of the Texas Code of Criminal Procedure to include "marshals or police officers of an incorporated city, town, or village, **and those reserve municipal police officers who hold a permanent peace officer license issued under Chapter 1701, Occupations Code.**" **Tex. Code Crim. Proc. Ann. § 2.12(3) (West 2015).** All of the reserve officers in the current matter held permanent peace officers' licenses. *See Chambers v. State*, ---- SW3d ----, 2019 WL 2612770, *7 (Tex. Crim. App. June 26, 2019).

The scenario of these licensed reserve officers was similar to the status of the reserve officers in *Cleveland v. City of Elmendorf, Tex.*, 388 F.3d 522 (5th Cir. 2004). Those officers were determined to be volunteers and as such were not entitled to

FLSA's overtime pay requirements. A footnote stated: "A law enforcement officer in the State of Texas must be licensed by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") (TCLEOSE now called the Texas Commission on Law Enforcement or TCOLE) in order to be a police officer. To maintain his license, an officer must either (1) have his police commission maintained by a law enforcement agency or (2) continue with law enforcement education classes." *Cleveland*, 388 F.3d at 525, FN 2 ¹; *See also* Tex. Crim. Proc. Code Ann. § 2.12.

Notably, not all reserve municipal peace officers are peace officers under Article 2.12 of the Code of Criminal Procedure; and as such only those who hold a TCOLE license issued under V.T.C.A. Occupations Code, Chapter 1701, are peace officers. A reservist with a permanent peace officer license shall be referred to as a **"licensed reservist"** and a reservist without a permanent peace officer license shall be referred to as an **"unlicensed reservist"**. An unlicensed reservist is NOT a "peace officer" under T.C.C.P. Art. 2.12. and are not subject to TCOLE as a licensed reservist is.

¹. A law enforcement officer in the State of Texas must be licensed by the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") in order to be a police officer. To maintain his license, an officer must either (1) have his police commission maintained by a law enforcement agency or (2) continue with law enforcement education classes. *See* TEX.CRIM. PROC.CODE. ANN. § 2.12. In short, working for the City as a "volunteer" meant that such individual maintained his status as a peace officer under the laws of Texas. The record does not indicate that any cost to the City was implicated for maintenance of the commissions.

The general powers of commission and rulemaking authority of TCOLE is set forth in V.T.C.A. Occupations Code §1701.151. Among its general powers are that the commission may:

- (1) adopt rules for the administration of this chapter and for the commission's internal management and control;
- (2) establish minimum standards relating to competence and reliability, including education, training, physical, mental, and moral standards, for licensing as an officer, county jailer, public security officer, or telecommunicator;
- (3) report to the governor and legislature on the commission's activities, with recommendations on matters under the commission's jurisdiction, and make other reports that the commission considers desirable;
- (4) require a state agency or a county, special district, or municipality in this state that employs officers, telecommunicators, or county jailers to submit reports and information;
- (5) contract as the commission considers necessary for services, facilities, studies, and reports required for:
 - (A) cooperation with municipal, county, special district, state, and federal law enforcement agencies in training programs; and
 - (B) performance of the commission's other functions; and
- (6) conduct research and stimulate research by public and private agencies to improve law enforcement and police

administration.

(V.T.C.A. Occupations Code §1701.151)

While the language of subparagraph (4) states: “require **a state agency or a county, special district, or municipality in this state that employs officers, telecommunicators, or county jailers to submit reports and information, it does not preclude reports and information concerning appointed licensed reserve officers as well.** At the time of the incidents which led to the filing of charges against the Appellant, his subsequent indictment, and his conviction, the Indian Lake Police Department had two officers who were under its employ. The Appellant, John Chambers was the Chief of the Indian Lakes Police Department and Alfredo Avalos was his paid associate. In addition to the two employed officers there were approximately 28 unpaid volunteer licensed reserve officers who, like the two employed officers also had active peace-officer licenses. *See*, (10 RR 130, Trial testimony of Sgt. Tracy Weems of the Law enforcement division of TCOLE).

Laws concerning TCOLE are found in the Texas Occupations Code, some, including definitions, are found in the Texas Administrative Code. More specifically Title 37, Public Safety and Corrections, Part 7, Texas Commission on Law Enforcement. There is a definitions guide 37 TAC § 211.1, the relevant definitions pertinent to this motion and in support of a rehearing are:

§ 211.1. Definitions

(a) The following words and terms, when used in this part, shall have the following meanings, unless the context clearly indicates otherwise.

(4) **Active**--A license issued by the commission that meets the current requirements of licensure and training as determined by the commission.

(6) **Agency**--A law enforcement unit or other entity, whether public or private, authorized by Texas law to appoint a person licensed or certified by the commission.

(7) **Appointed**--Elected or commissioned by an agency as a peace officer, reserve or otherwise selected or assigned to a position governed by the Texas Occupations Code, Chapter 1701, without regard to pay or employment status.

(27) **Firearms**--Any handgun, shotgun, precision rifle, patrol rifle, or fully automatic weapon that is carried by the individual officer in an official capacity.

(28) **Firearms proficiency**--Successful completion of the annual firearms proficiency requirements.

(29) **Fit for duty review**--A formal specialized examination of an individual, **appointed to a position governed by the Texas Occupations Code, Chapter 1701, without regard to pay or employment status**, to determine if the appointee is able to safely and/or effectively perform essential job functions. The basis for these examinations should be based on objective evidence and a reasonable basis that the cause may be attributable to a medical and/or psychological condition or impairment. Objective evidence may include direct observation, credible third-party reports; or other reliable evidence. The review should come after other options have been deemed inappropriate in light of the facts of the case. The selected Texas licensed medical doctor or psychologist, who is familiar with the duties of the appointee, conducting an examination should be consulted to ensure that a review is indicated. This review may include psychological and/or medical fitness examinations.

(41) **Licensee**--An individual holding a license issued by the commission.

(43) **Moral character**--The propensity on the part of a person to serve the public of the state in a fair, honest, and open manner.

(44) **Officer**--A peace officer or reserve identified under the provisions of the Texas Occupations Code, §1701.001.

(46) **Peace officer**--A person elected, employed, or appointed as a peace officer under the provisions of the Texas Occupations Code, §1701.001.

(55) **Reserve**--A person appointed as a reserve law enforcement officer under the provisions of the Texas Occupations Code, §1701.001.

(58) **Separation**--An explanation of the circumstances under which the person resigned, retired, or was terminated, reported on the form currently prescribed by the commission, in accordance with Texas Occupations Code, §1701.452.

(37 TAC § 211.1) (emphasis added).

Most importantly, before a Law Enforcement Agency may appoint a licensed person or a person seeking a license, the appointing agency must follow the guidelines and procedures set forth by 37 TAC § 217.7 which states as follows:

§ 217.7 Reporting Appointment and Separation of a Licensee

(a) Before a law enforcement agency **may appoint a person licensed** or seeking a license as a peace officer, county jailer, or telecommunicator **the agency head or designee must:**

- (1) obtain the person's written consent for the agency to view the person's employment records;
- (2) obtain a copy of the Personal Status Report (PSR) maintained by the commission;

- (3) obtain a completed, signed, and notarized Personal History Statement (PHS);
- (4) obtain a Computerized Criminal History (CCH) from TCIC and NCIC;
- (5) obtain proof of eligibility after separation from the military, if applicable;
- (6) conduct and document a background investigation;
- (7) **for peace officers, obtain proof of weapons qualification within the 12 months preceding appointment;**
- (8) for current licensees, electronically request and obtain the F-5 Return (F5R) from the commission, contact each of the person's previous law enforcement employers, and document the contact on the F5 return;

[omitting other internal language]

- (d) An **agency must retain records** kept under this section while the person is appointed and for a minimum of five years after the licensee's separation date with that agency. **The records must be maintained under the control of the agency head or designee in a format readily accessible to the commission.**

(37 TAC § 217.7) (Emphasis added).

As this section shows, any law enforcement agency, including the Indian Lakes Police Department, before appointing a licensed person to their agency *must* obtain records to show his/her qualifications for that appointment. It also expressly states **“for peace officers, obtain proof of weapons qualification within the 12 months preceding appointment”**. (37 TAC § 217.7 (a)(7)). In addition, the agency is also

given the express task that it **“retain records kept under this section while the person is appointed and for a minimum of five years after the licensee's separation date with that agency”**. The records must be maintained under the control of the agency head or designee in a format readily accessible to the commission.” (37 TAC §217.7 (d)). A review of past iterations of 37 TAC §217.7 dating back to 2010, indicates that it is fairly consistent with the current version 37 TAC §217.7 as stated above.

There are other sections which indicate that records shall be kept on file and made available to the commission. One example is 37 TAC § 211.19, here the commission is stating what sorts of records are to be kept, how they should be maintained and sent to the commission by an agency; see below:

§ 211.19 Forms and Applications

- (a) Applications, forms, data, and documents required by the commission shall be submitted electronically if an electronic method has been established for the form, data, or document.
- (b) For applications or other forms required by the commission, the applicant or the individual on whose behalf the form is being submitted is responsible for reviewing the entire document and any attachments to attest to the accuracy and truthfulness of all information on and attached to the document.:
- (c) A person who fails to comply with the standards set forth in these rules shall not accept the issuance of a license and shall not accept any appointment.
- (d) If an application is found to be false or untrue, any license or certificate issued to the applicant by the commission will be subject to cancellation and recall.**

- (e) Agencies must keep on file and in a format readily accessible to the commission a copy of the documentation required by the commission. If the form or application is submitted via TCLEDDS, the agency must keep on file, and in a format readily accessible to the commission, a signed and dated printout of the electronically submitted form or application.
- (f) An agency must retain required records for a minimum of five years after the licensee's termination date with that agency.

(37 TAC § 211.19) (emphasis added).

Under 37 TAC § 217.7 the agency head, or its designee, from where they are leaving must gather certain records and documents to forward to the new agency about its potential appointee. If the records are sent by the Indian Lakes PD, then a fraud has been committed against the commission and the new appointing agency. The records for peace officers, includes the sending of documents showing proof of weapons qualification within the 12 months preceding the appointment, should be sent to the new agency. However, under 37 TAC § 211.19 (d), “if an application is found to be false or untrue, any license or certificate issued to the applicant by the commission will be subject to cancellation and recall.” In this matter the potential existed that the falsified firearms qualification reports would be found to be false and the potential existed that the license could be taken away by cancellation or recall of the license by the Commission.

As TECOLE requires licensed peace officers to annually qualify with their respective service weapons, Tex. Occupations Code § 1701.355, the commission

requires that these reports be kept by the appointing law enforcement agencies.

Further, TECOLE requires that when an officer separates from the particular agency, the agency must maintain the officer's hiring documents and firearm qualification records for the subsequent five-year period following their separation. The records would contain false entries and the Chief of police in this matter did order the records be falsely manufactured in violation of Tex. Penal Code § 37.10 (1), (2), (3) and (5). The statutory defenses are not available because the false records were knowingly made by the Appellant, and/or he did it with knowledge of its falsity and with the intent that it be taken as a genuine governmental record, and/or that he ordered the false information and report to be made and presented with knowledge of its falsity. An argument could also be made that under 37 TAC § 37.10 (a)(3) that his actions impaired the verity or truth of the document. There is no statutory defense for this subsection. *Id.*

Lastly, the Occupations Code provides for Administrative Penalties to be assessed to any law enforcement agency or governmental entity violating Chapter 1701 or any of the rules made under chapter 1701. Texas Occupations Code § 1701 *et. seq.* is set out below:

- (a) In addition to other penalties imposed by law, a law enforcement agency or governmental entity that violates this chapter or a rule adopted under this chapter is subject to an administrative penalty in an amount set by the commission not to exceed \$1,000 per day per violation. The administrative penalty shall be assessed in a proceeding conducted in accordance with Chapter 2001, Government Code.

- (b) The amount of the penalty shall be based on:
- (1) the seriousness of the violation;
 - (2) the respondent's history of violations;
 - (3) the amount necessary to deter future violations;
 - (4) efforts made by the respondent to correct the violation; and
 - (5) any other matter that justice may require.
- (c) The commission by rule shall establish a written enforcement plan that provides notice of the specific ranges of penalties that apply to specific alleged violations and the criteria by which the commission determines the amount of a proposed administrative penalty.

Texas Occupations Code § 1701.507.

2. **A rehearing should be granted because the State has shown that the government has the legal authority to require the keeping of records by TCOLE and therefore shows that it is legally possible to defraud the government by filing a false record.**

The State has shown that the State Legislature has conveyed to TCOLE the legal authority to require the keeping of records for any licensed appointee to a police reserve force. The State also asserts that this Honorable Court's conclusion that it was legally impossible for TCOLE to be defrauded by the Appellant's deceit and for Appellant to intend to defraud TCOLE through his deceit, is not supported by the law. For example, V.T.C.A. Occupations Code § 1701.153, gives TCOLE the authority to establish reporting standards and procedures for: (a)(1) the appointment or employment and the termination of officers, county jailers, and telecommunicators by law enforcement agencies. It also states: (c) The chief administrative officer of a law enforcement agency or licensed training school is responsible for compliance with the reporting standards and procedures prescribed by the commission. *Id.*, (a)(1) and (c).

The Commission also sets forth the procedures to be followed by a law enforcement agency or governmental entity when appointing a licensed officer, V.T.C.A. Occupations Code § 1701.303 states: (b) A person who appoints an officer or county jailer licensed by the commission shall notify the commission not later than the 30th day after the date of the appointment. If the person appoints an

individual who previously served as an officer or county jailer and the appointment occurs after the 180th day after the last date of service as an officer or county jailer, the person must have on file for the officer or county jailer in a form readily accessible to the commission:

- (1) new criminal history record information;
- (2) a new declaration of psychological and emotional health and lack of drug dependency or illegal drug use; and
- (3) two completed fingerprint cards.

Id., (b).

These are some of the rules which TCOLE has in place to monitor and ensure that licensed peace officers *appointed* by a law enforcement agency meets what TCOLE believes to be, at best, the minimal level that these appointed peace officers need to obtain for the public's safety in the State of Texas. TCOLE has the authority to review records and audit records of hired officers, but also those hired or appointed under V.T.C.A. Occupations Code § 1701.303. TCOLE also has established administrative penalties, in addition to other penalties imposed by law, for law enforcement agencies or governmental entities that violate the chapter (1701) or a rule under chapter (1701). V.T.C.A. Occupations Code § 1701.507.

The State would ask this Honorable Court to note that TCOLE has rules and requirements in place, though authority granted to it by the State Legislature to

protect citizens of the State of Texas from peace officers who may have been poorly trained or do not meet minimal safety standards. Appellant's deceit was exactly the type of issue contemplated by TCOLE in its rules and regulations. At a time in American and Texas history where law enforcement is highly suspect by a large number of individuals, for being ill trained or for over-reacting, such as in the death of Sandra Bland, this Honorable Court should hold the Appellant responsible for his acts of deceit.

Furthermore, any officer involved shooting will mandate the discovery of the firearms records by the local prosecuting authority or in relation to any civil lawsuits. Speaking in regard to the records made available to local prosecuting attorneys imagine the headaches lying in wait for the prosecution under the "Michael Morton Act" or *Brady*. It is reasonably foreseeable that even if not legally required, the possible execution of job duties will most certainly make the records relevant. Thus, it cannot be said that the Appellant harbored no intent to defraud or harm.

Lastly, of interest, is the definition of moral character. 37 TAC § 211.1 (43). Moral character is defined by TCOLE as, "The propensity on the part of a person to serve the public of the state in a fair, honest, and open manner. *Id.* The State maintains that the Appellant did not adhere to this standard as well as others he violated or ignored.

CONCLUSION

In conclusion the State would note that there is no question that the Appellant had falsified the firearms qualifications records. The State contends that the laws governing TCOLE and organizations like the Indian Lake Police Department, and its Chief, John Chambers, gives TCOLE the right and duty to audit the records of the reserve peace officers in question. The falsified documents were made to lead TCOLE to believe the officers in question all had valid firearms qualification for the preceding 12 months when they did not. For the reasons stated above the State was harmed by the falsification of the documents and sorely misled, intentionally by the Appellant, John Chambers who had a duty to serve the public of the state in a fair, honest and open manner. A duty to the public which he abandoned.

PRAYER FOR RELIEF

The State prays that this Honorable Court notes that the arguments in its Motion for Rehearing had previously been a part of the States reply brief to the original brief by the Appellant and as well as in its Reply to Appellant's PDR, and inelegantly presented by the undersigned attorney for the State at oral argument. We humbly ask that our that motion for rehearing be granted and that this Court reverse its decision and affirms, in all things the conviction from the Trial Court and the lower Court of Appeals.

Respectfully Submitted,

LUIS V. SAENZ

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the Microsoft Word 360 word count tool this document contains 3978 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/S/ Samuel B. Katz

Samuel B. Katz
Assistant District Attorney

CERTIFICATE OF SERVICE

I certify that on Thursday, July 11, 2019, a copy of the foregoing State's Motion for Rehearing was served to the following attorneys of record for Petitioner John Chambers via electronic mail.

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